but before facts have been given, it is the usual practice to allow such plea to be withdrawn. That is an elementary rule because all that an accused person need to do is to refuse to admit to the facts or to enter a qualified plea by pleading other facts which would then be treated as amounting to claiming trial to the charge. In this case therefore the learned president was wrong and I have no hesitation in setting aside the conviction of the respondent. I am unable also to understand how the learned president could have gone ahead to convict the accused even though he had apparently pleaded guilty when he had recorded that the accused said "I did not attempt to rob complainant". Therefore, whatever other admission he made to the facts, he made no admission to a necessary ingredient in the charge against him that on the night in question he did an act which amounted to an attempt to rob. All that the evidence disclosed was that for some reason or other, there was a fight and there was use of criminal force by the accused against the complainant but there is no evidence on record that even if he did thrust a sharp instrument on the abdomen of the complainant, he had made any attempt either to snatch complainant's wallet or other property or had made any verbal demand for the handing over of property to him. In those circumstances, to say that the accused had attempted to rob was pure conjecture, although not perhaps unreasonable in the light of what had happened to other courting couples.

The story of the accused that he was only a peeping-tom is the more probable having regard to the time — 8.30 p.m. — and the complainant who apparently was committing the offence of kheluat resented this intrusion and tried to knock some sense into the accused.

I do not however propose merely to set aside the conviction and sentence and remit the accused for trial upon another charge which could be maintained against him — possibly one of using criminal force — as he has been in custody from the 25th of August up to to-day. I accordingly content myself by setting aside the conviction and sentence of six months imprisonment.

Conviction and sentence set aside.

BEECHAM GROUP LTD. v. SIME DARBY SINGAPORE LTD. & ORS.

[O.C.J. (Buttrose J.) October 20, 1967]

[Singapore — Motion in Suit No. 1065 of 1967]

Patents — Infringement of — Importation and sale of drug — Pharmaceutical and clinical differences — — Injunction — Registration of United Kingdom Patents Ordinance (Cap. 181).

The plaintiff company had manufactured in England and produced a semi-synthetic penicillin drug called ampicillin which was covered by patents throughout the world. The second defendants Bristol-Myers Co. also produced ampicillin under licence in the U.S.A. The present action arose from the manufacture and sale of another semi-synthetic penicillin drug called hetacillin by the defendants which the plaintiffs claimed infringed the plaintiffs' Letters Patent and which would cause them substantial injury for which damages would not compensate.

The plaintiffs contended that the present motion was in essence based on the same material facts as the one made in England recently where the English Court of Appeal granted the present plaintiffs an interlocutory injunction against the second defendants. The defendants argued that new evidence which had now been adduced in the present motion had established that hetacillin was different and that that evidence was not before the English Court of Appeal when the case was decided.

Held: (1) there were reasonable grounds for saying that hetacillin was medically equivalent to ampicillin and in the circumstances a *prima facie* case of infringement had been made out;

(2) the pharmaceutical and clinical differences referred to in the affidavits between the two drugs were not matters of any real significance even assuming them to be accepted as such;

(3) on the saccharine principle as laid down by Buckley J. in *Saccharine Corporation Ltd.* v. *Anglo Continental Chemical Works Ltd.*[3] the importation and sale of hetacillin in Singapore was *prima facie* an infringement;

(4) on the evidence before the court greater damage would arise to the plaintiffs by withholding the injunction in the event of them succeeding than to the defendant by granting the injunction in the event of the injunction proving afterwards to have been wrongly granted.

Cases referred to:—

(1) *Van der Lely* v. *Bamfords Ltd.* [1963] R.P.C. 61.

(2) *Clark* v. *Adie* (1873), 10 Ch. D. 667.

(3) *Saccharine Corporation Ltd.* v. *Anglo Continental Chemical Works Ltd.* [1901] 1 Ch. 414.

(4) *Reitmeyer case* [1900] 2 Ch. 659.

(5) *Wilderman* v. *F. W. Berk & Co. Ltd.* (1924), 42 R.P.C. 79.

MOTION.

John Patrick Graham, Q.C. (*A. C. Fergusson* with him) for the plaintiffs.

Richard Kesham Fullagar, Q.C. (*A. P. Godwin* with him) for the defendants.

Cur. Adv. Vult.

Buttrose J.: This is a motion for an interlocutory injunction restraining the defendants and each of them until judgment in this action or further order and whether by their servants, agents or otherwise from advertising, offering for sale, selling or supplying the antibiotic hetacillin or any preparation containing the same or otherwise infringing any or all of the plaintiffs' United Kingdom Letters Patent Nos. 870395 and 873049 registered in Singapore under the

provisions of the Registration of United Kingdom Patents Ordinance as No. 99 of 1965 and No. 34 of 1962 respectively.

The plaintiff company has manufactured in England and produced a semi-synthetic penicillin drug called ampicillin which is covered by patents throughout the world. In the United States of America the 2nd defendants also produce ampicillin under licence. The present action arises from the manufacture and sale of another semi-synthetic penicillin drug called hetacillin by the defendants which so it is said infringes the plaintiffs' Letters Patent and which will cause them substantial injury for which damages will not compensate.

It has developed, so I was told, into a world-wide battle between Beecham Group Limited and the American firm of Bristol-Myers Company the 2nd defendants. It was not disputed that the semi-synthetic product called ampicillin was discovered and made by the plaintiffs in the latter part of 1957 through the isolation of the penicillin 'nucleus' 6-aminopenicillanic acid and has been recognised throughout the world as a fundamental break-through in the field of chemotherapy and in the manufacture of antibiotics. It is, I think I am right in saying, the only commercially available penicillin known to be highly active against both Gram-positive and Gram-negative organisms over a broad spectrum and is rapidly becoming one of the major therapeutic agents of the world. Following this discovery a close relationship existed between Beecham Group Limited and Bristol-Myers Company and arrangements were made to co-operate on a world-wide basis. Broadly speaking, according to the plaintiffs, Bristol-Myers Company were to have the rights of manufacture and sale in the Americas leaving the rest of the world to Beecham Group Limited.

This arrangement would appear to have worked out satisfactorily and both companies co-operated and were of considerable assistance to each other. Quite recently, however, the plaintiffs say that the 2nd defendants decided to enter the plaintiffs' market as for example in Britain, Australia, Malaya and Singapore and the plaintiffs were not prepared to accept this and that was why they took proceedings against Bristol-Myers Company not only in Britain but in other parts of the world including the present motion before the court here.

No point was taken before me as to the validity of the patents and I am, I think, entitled to and do assume *prima facie* their validity for the present purposes.

The next question is whether these patents have been infringed by the defendants by the importation and sale in Singapore of the drug hetacillin.

My attention was drawn to the recent Court of Appeal decision in England granting the present plaintiffs an interlocutory injunction against Bristol-Myers Company similar to the one now sought in the present action. It was contended on behalf of the plaintiffs that the appeal decided in England was in essence based on the same material facts as is the motion now before the court.

For the defendants it was argued that new evidence which has now been adduced has established that hetacillin is different from ampicillin medically, pharmaceutically and clinically and that this evidence was not before the Court of Appeal in England.

Both the substances, that is hetacillin and ampicillin, are made by processes which are closely allied to each other and substantially essentially similar the only difference being the introduction of acetone in the case of hetacillin.

It is unnecessary nor do I propose to deal with their method of preparation. Lord Denning the Master of the Rolls in the Court of Appeal decision, to which I was referred, dealt with the matter in this way:—

> "Structurally hetacillin is a different product from ampicillin, but it is made by a process which is almost identical with the process for ampicillin, except for a small addition. In this drug hetacillin you start again with this fundamental penicillin nucleus, 6-aminopenicillanic acid (6-apa) and then you acylate it, so to speak but with the addition of an acetone. The reaction of these chemicals together gives the product hetacillin. But, in the course of the chemical reaction, there is a point of time when there is ampicillin present just before it is turned into hetacillin. After the hetacillin is produced and used as a medicine (by being injected or inserted into the bloodstream) the process is reversed. The hetacillin in the blood turns into ampicillin, and then the ampicillin destroys the injurious germs in the system. It is the ampicillin which is really the curative."

Another member of the Court of Appeal, Russell L.J., had this to say about the matter:—

> "On infringement, here there seems to me to be a mere addition (which I am prepared to accept is perhaps useful) to the plaintiffs' invention. The defendants' product is an antibiotic and nothing else. The fundamental essential of the defendants' product is the antibiotic ampicillin, which is the plaintiffs' invention. The application of acetone to ampicillin in appropriate conditions of acidity, alters it is true, the chemical composition of the defendants' product so as to make that chemical composition different from that of ampicillin; but the process leaves, and deliberately leaves, the ampicillin, so to speak, latent, awaiting its necessarily intended re-emergence in the alkaline condition of blood or intestines. Thus, it seems to me the whole of the plaintiffs' invention is taken and incorporated in the defendants' antibiotic product and is the whole of the antibiotic element in the defendants' product."

With these statements of the position I am bound to say with respect, that I agree.

It was urged upon me that this approach to the matter pays scant regard to the chemical, pharmaceutical and clinical differences between

the two drugs as disclosed by the new affidavit evidence filed shortly before and during the hearing of this motion. It was because of this that I took time to consider further these affidavits in the light of the arguments that have been addressed to me.

It was never in dispute, as I understood it, that the chemical formulae of the two substances was not identical or that their chemical structure or composition was different.

The pharmaceutical and clinical differences referred to in the affidavits are not, in the view I take, matters of any real significance even assuming them to be accepted as such.

To take but one example namely, the difference in blood levels obtained by the two substances. With regard to the chemical behaviour of hetacillin in the body it would appear that the peak blood levels obtained with hetacillin 2 to 3 hours after oral administration are due to the hydrolysis product ampicillin and this so far as I am aware has never been denied. For practical purposes as was pointed out in one of the affidavits filed on behalf of the plaintiffs hetacillin following oral administration hydrolyses sufficiently rapidly to allow the hydrolysis product, namely, ampicillin to provide the antibacterial activity in the blood. The difference in blood levels between hetacillin and ampicillin following oral administration can be attributed to delay in absorption while hetacillin is being hydrolysed to ampicillin in the gut, the majority of hetacillin being absorbed as ampicillin.

It is not, I apprehend, a proper approach to this mattter to view it through the eyes of a chemistry professor nor do I propose to do so. The real question, so it seems to me, is whether in substance and effect the two products are the same in the proper context. See *Van der Lely* v. *Bamfords Ltd.*[1] *per* Lord Reid at p. 75 quoting James L.J. in *Clark* v. *Adie.*[2]

In the view I take of the matter there are reasonable grounds for saying that hetacillin is medically equivalent to ampicillin and in these circumstances a *prima facie* case of infringement has been made out.

On the saccharine principle, upon which I need not elaborate, laid down by Buckley J. in *Saccharine Corporation Ltd.* v. *Anglo Continental Chemical Works Ltd.*[3] followed in the *Reitmeyer case* [4] and accepted by Tomlin J. in *Wilderman* v. *F. W. Berk & Co. Ltd.*[5] and also by the Court of Appeal in the decision to which I have already made reference it seems to me clear that the importation and sale of hetacillin in Singapore is *prima facie* an infringement. I can see no reason for limiting the application of the saccharine doctrine as contended for on behalf of the defendants.

A further point which was taken was that under the licence agreements the defendants had a licence from the plaintiffs to do everything they have done or seek to do and consequently if this argument prevails it would, *per se,* prove fatal to the plaintiffs' claim.

The difficulty I find in dealing with this matter is that objections were raised on behalf of the defendants to certain portions of the evidence contained in the affidavits filed by the plaintiffs some of which related to these licence agreements.

It would, I think, for that reason alone, apart altogether from other considerations, be inadvisable to embark on a critical examination and analysis of the argument until it can be considered in the light of all the admissible and relevant evidence available. It is a matter which will no doubt receive the closest scrutiny of the trial judge in the light of this evidence but it would be inappropriate at this stage for me to make any final pronouncement upon it. Suffice it to say, as the matter now stands, I am not prepared to say that these licence agreements bear the construction placed upon them by the defendants.

So far as the balance of convenience point is concerned I have come to the conclusion on the evidence before me that greater damage would arise to the plaintiffs by withholding the injunction in the event of them succeeding than to the defendants by granting the injunction in the event of the injunction proving afterwards to have been wrongly granted.

On the question of whether the 2nd defendants were improperly or recklessly joined all I need say is that the pleadings disclose the reason why they were joined and there is evidence *prima facie* to justify it.

Reasonable grounds have, in my judgment, been established *prima facie* which require me to say to the defendants that they must stay their hands until the final hearing and determination of this action.

There will be an order in terms of the motion subject to the usual undertaking as to damages. I am prepared to certify that this is a matter which should have a speedy trial compatible with and after making due allowance for the numerous pre-trial issues and difficulties which must of necessity arise in a case of this nature and magnitude. Costs will be costs in the cause and on the higher scale. I certify for two counsel. Stay refused.

Injunction granted.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*